



**Ethics and Anti-Corruption Commission v Otieno & 4 others (Anti-Corruption and Economic Crimes Civil Suit E015 of 2021) [2023] KEHC 17840 (KLR) (Anti-Corruption and Economic Crimes) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17840 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E015 OF 2021**

**EN MAINA, J**

**MAY 23, 2023**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**BOB KEPHAS OTIENO ..... 1<sup>ST</sup> DEFENDANT**

**CAROLINE CHEPKEMOI SANG ..... 2<sup>ND</sup> DEFENDANT**

**MAURICE ODIWUOR AMEK ..... 3<sup>RD</sup> DEFENDANT**

**DAVID OBONYO AND LILIAN ACHIENG T/A DAMILA ENTERPRISES  
LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**EVERLYNE OWINO OGUTU ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. When this matter came up for hearing before me on April 24, 2023 Learned Counsel appearing for the Plaintiff called Paul Githinji Kariuki (PW6), a bank official, to the stand so as to produce certain bank records, inter alia, bank statements. The production of the documents was however vehemently opposed by Counsel for the Defendants as they were not certified as bank records and also for reason that they were not accompanied by a certificate as provided in Sections 65(6) and 106B of the *Evidence Act*. After hearing counsel for the parties this court rejected the documents and gave its reasons for the decision in a ruling delivered on the same date. Thereafter on the next hearing date in addition to filing the present application Counsel for the Plaintiff sought to introduce documents which she had had certified when the court adjourned but again the same could not be admitted for reason that they were not accompanied by a certificate under Section 106B of the *Evidence Act*. Counsel sought to stay the proceedings which application was rejected by this court. However as there was an application already



on record this court gave directions thereto and ordered that a ruling would be delivered before the hearing continued.

2. The application which is made under Sections 1A,1B,3A and 63 of the Civil Procedure Act, Order 11, 18 Rule 10 and 50 of the Civil Procedure Rules and seeks the following orders:

- ' 1) Spent.
2. This Honourable Court be pleased to grant the Plaintiff leave to file the annexed Supplementary List and Bundle of Documents thereto.
3. Upon grant of prayer 2 above the Plaintiff to file and serve the said Supplementary Affidavits and annexures thereto upon the Defendants within 4 days and the Defendants be granted 14 days corresponding leave to file responses.
4. This Honourable Court do order Paul Githinji witness number 6 to be recalled to testify and to produce relevant documents from Equity Bank.
5. That in the alternative, the investigating officers be allowed to produce the said documents mentioned in prayer 4.
6. That the court do order that the original suspense account book for account number xxxx contained in Nairobi HC ACEC Appeal No 4 of 2022 and as consolidated with Nairobi HC ACEC Appeal No 5 of 2022; DPP VS BOB KEPHAS & Others be produced in this honourable court for perusal.
7. Costs of this application be in the cause.'

3. The Application is made on the following grounds stated on the face of it:-

- ' 1) Under the Anti-Corruption and Economic Crimes Act, 2003 and Section 11(1)(d) and (j) of the EACC Act, 2011, the Commission is mandated to investigate any matter on suspicion of corruption or where facts disclose corrupt conduct in the management or execution of public or private affairs and make recommendations to the Director of Public Prosecution for the prosecution and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption.
2. That at the hearing of the suit, the Plaintiff's advocate noted that it had inadvertently omitted to file an electronic certificate as required under section 106 B, of the Evidence Act certified copies of the bank's documents and clear legible
3. documents of Equity Bank Limited, this likely occurred during the compilation of the bundle of documents prepared by the Plaintiff's Advocate.
4. That the error on the part of the Advocates should not be visited on the client.
5. The Plaintiff seeks to leave to file Supplementary List and Bundle of Documents for purposes of furnishing this Honorable Court and the Defendants with the omitted evidence to enable this Honourable Court make a just determination of the dispute.



6. There will be no prejudice occasioned to the Defendants as they will be given an opportunity to controvert the evidence. Conversely, the Plaintiff will suffer immense prejudice as it may not be able to discharge its burden under Section 11(1)(d) and (j) of the EACC Act, 2011 to adduce evidence to the satisfaction of the Court that the Defendants were beneficiaries of proceed as crime.
  7. That it is just, reasonable and in the interest of justice that this application be heard on priority basis noting that further hearing of the Plaintiff's case is scheduled for April 26, 2023.'
4. Learned Counsel for the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants opposed the application vide the affidavit of David Obonyo Mreri dated May 8, 2023 on the grounds that the new documents were procured by the Plaintiff on 25<sup>th</sup> and April 27, 2023, way after the matter had been certified ready for hearing; that the Plaintiff's decision to file additional documents was triggered by the nature of the hearing of the matter on 24<sup>th</sup> and April 25, 2023 where the court dismissed the Plaintiff's oral application seeking to introduce additional evidence on the reason that they were not accompanied by a certificate of electronic evidence.
  5. That the Plaintiff's recourse against the ruling of April 25, 2023 lies with the court of appeal since this court has already rendered itself on the matter; that the Plaintiff's introduction of new evidence runs afoul of the principles set in *Abdi Mohamud v Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR* and the just and expeditious trial for the Defendants. Lastly, that the application is incompetent, ill-advised and it is in the interest of justice and fairness that it be dismissed with costs.

#### **Submissions by the parties**

6. The Plaintiff filed written submissions dated May 17, 2023.
7. The 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents on their part relied on their submissions dated May 8, 2023.
8. The 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents framed two issues for determination: Whether leave to admit additional evidence should be granted in the matter; and Whether it is just and proper for the court to recall PW6 Paul Githinji to produce the additional evidence.
9. The Respondents contend that application has been filed at the tail end of the proceedings where all but one of the Plaintiff's witnesses have testified; that the court already rendered its decision on the admissibility of the new documents as evidence vide the Ruling of April 25, 2023; that the Application in any case does not meet the threshold of Abdi Mahamud (Supra), whether the Supreme court held that the court could only admit additional evidence sparingly and with abundant caution.
10. They submitted further that it is not just and proper for the court to recall PW6 to produce additional evidence as Order 18 Rule 10 of the Civil Procedure Rules and Section 146 (4) of the *Evidence Act* limit the circumstances in which the court may recall a witness; that PW6 Paul Githinji testified that he left Equity Bank and the new documents to be adduced were procured by one Austine Amoth in April 2023. As such PW6 is not competent to produce the said documents. They urged the court to dismiss the Application.
11. The Plaintiff/Applicant seeks to adduce additional evidence vide a supplementary list of documents dated April 25, 2023. These are 10 sets of documents serialized as Annexure 1 and 2a-2i in the Plaintiff's supplementary bundle and include a letter requesting for the production of the suspense account extract book, 3 certificates of electronic evidence, account opening documents and bank statements of the Homabay County Assembly and the Respondent's bank accounts. The Respondents in opposing



the Application have contended that this court made a determination on the production of the additional evidence vide a ruling delivered on April 25, 2023.

12. I have carefully considered the application, the responses, the submissions on record, the cases cited and the law. It is my finding that this application has no merit. I say so for reason that what is sought to be produced is not additional evidence or supplementary documents as alleged by the Applicant but production of documents which were rejected by this court on grounds that they did not comply with the law and rules of evidence regarding production of bankers records as provided under Section 176 to 179 of the Evidence Act. Section 3 of the Evidence Act defined bankers books as:

' Banker's book' includes a ledger, day book, cash book, account book, and any other book used in the ordinary business of the bank, whether in CAP 80 [Rev 2012] Evidence [Issue 1] 12 written form or micro-film, magnetic tape or any other form of mechanical or electronic data retrieval mechanism whether kept in written form or printouts or electronic form.'

The statements and copies of cheques sought to be produced are therefore for all intents and purposes banker's books. No evidence whatsoever was however adduced that the same had been compared/ examined with the original and that they were correct. Moreover, these were documents that were produced electronically and which therefore required a certificate whether under Section 65(6) or Section 106 B of the Evidence Act. The same did not have such a certificate and they were clearly therefore not admissible. The documents now sought to be adduced in evidence were prepared after the rejection of the initial documents. This is therefore a case of a party trying to patch up his case. In the case of *Abdi Mohamud v Ahmed Abdullahi Mohamed & 3 others* [2018] eKLR the Supreme Court while considering the issue of additional evidence on appeal was categorical that the discretion of the court to allow additional evidence should never be exercised to allow a party to patch up its case. The court stated:

- ' (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.'

13. I agree with Counsel for the Defendants that in the circumstances of this case the plaintiff's recourse lay with filing an appeal against the decision of this court but not in having the documents rectified and somewhat trying to compel this court to admit the same. It would have been different if the statements were indeed additional evidence or if they were documents which were in the possession of the Plaintiff which had inadvertently been left out of the bundle. The opposite is however true and it is that once the documents were rejected Counsel hurried to the bank and sought to remedy the error by having them certified as being from the bank. The certificate under Sections 65(6) and 106B of the Evidence Act were however still lacking in regard to the documents. Rules of evidence are intended to guarantee a fair trial to all the parties. They are not merely technicalities that can be wished away or ignored. Without evidence that the entries in the statements and records had been examined with the original entries and they were correct (Section 177(1)(d) of the Evidence Act), which fact in my view could have been proved through a certification stamp by the bank, and without proof that the records were reproduced from a computer at the bank where they were stored, a fact that could have been proved through a certificate under Section 65(6) or 106B of the Evidence Act, then I still hold the position that the documents are not admissible.



14. On the recall of Paul Githinji (PW6), witness the position is that Counsel herself informed this court that she had no more questions for the witness. He was then cross examined by Counsel for the Defendants after which she re-examined him. If there were any documents for him to produce, then he should have been asked to produce them. Be that as it may, Section 146(4) of the Evidence Act clothes this court with discretion to grant parties an opportunity to recall witnesses. It states: -

' 146(4). The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.'

15. There is no fetter to this court's discretion to recall a witness. In the circumstances the court shall accede to the request and have PW6 recalled but not so as to produce documents which this court adjudged inadmissible and no appeal has been filed. As for the prayer for production of the documents produced in HCACEC No 4 of 2022 my view is that nothing stops Counsel from applying for the documents to be released to her or for certified copies of the same for the purpose of producing them in this case. Prayer 6 of the application is therefore rejected. The application therefore succeeds only to the extent that the Plaintiff is granted leave to recall PW6 but is otherwise dismissed. The costs of the application shall be in the cause.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF MAY, 2023.**

**E N MAINA**

**JUDGE**

